UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

RITE AID OF NEW YORK, INC. AND
RITE AID OF NEW JERSEY, INC.,
A SINGLE EMPLOYER

and **Case 02-CA-160384**

1199 SEIU UNITED HEALTHCARE WORKERS EAST

***Rhonda Gottlieb, Esq*., for the General Counsel.**
Laura A. Pierson-Scheinberg, Esq., (Jackson Lewis, P.C.)
Baltimore, MD, for the Respondent.
Allyson L. Belovin and Susan J. Cameron, Esqs.,
***(Levy Ratner, P.C.) New York, NY,* for the Union.**

DECISION

Statement of the Case

STEVEN DAVIS, Administrative Law Judge: Based on a charge filed by 1199 SEIU United Healthcare Workers East (Union) on September 17, 2015, a complaint, as amended, was issued against Rite Aid of New York, Inc. and Rite Aid of New Jersey, Inc., a Single Employer (Respondent).

The Union has for many years been the admitted exclusive collective-bargaining representative of the Respondent's professional and nonprofessional employees in its New York and New Jersey stores. The staff pharmacists and the pharmacy interns who work in the New York stores are included in the unit. However, the staff pharmacists and pharmacy interns who work in the New Jersey stores are excluded from the unit.

Specifically, the unit description expressly excludes the store managers, pharmacy managers, supervising pharmacists, pharmacists in charge, New Jersey staff pharmacists and New Jersey pharmacy interns.

The complaint alleges that during the lengthy negotiation sessions in which the parties discussed the terms of a successor collective-bargaining agreement, the Respondent insisted, as a condition of reaching any collective-bargaining agreement, that the Union agree to remove newly hired interns and pharmacists working in stores in New York State from the bargaining unit. It is alleged that such a condition is not a mandatory subject of bargaining. The complaint alleges that by such conduct, the Respondent refused to bargain in good faith with the Union.

The Respondent's answer denied the material allegations of the complaint and on May 25 and June 6 and 7, 2016, this case was heard before me in New York, NY. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following:

Findings of Fact
I. Jurisdiction and Labor Organization Status

The parties stipulated that, for the purpose of this hearing, Rite Aid of New York, Inc., and Rite Aid of New Jersey, Inc. (Respondent) will be treated as a single employer with all of the obligations that single employers have in Board proceedings. It was also agreed that in the event of a ruling against the Respondent, Rite Aid of New York, Inc., and Rite Aid of New Jersey, Inc. agree to be jointly and severally liable for any Board Order or Court mandate with respect to this proceeding or any supplemental proceeding in this case.

The Respondent, domestic corporation operating retail drug stores in and around New York State and New Jersey, has derived annual gross revenues in excess of $500,000, and has purchased and received at its New York and New Jersey facilities goods valued in excess of $5,000 directly from suppliers located outside those states.

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. The Respondent also admits and I find that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. The Bargaining

The most current collective-bargaining agreement was effective from October, 1998 to October, 2002.

The collective-bargaining unit, as set forth in the 2009 Memorandum of Agreement which modified the1998 contract, is as follows:

> All the professional and non-professional employees of the Employer in drug stores set forth in Article I hereof [the coverage clause of the contract such as certain counties in New York and certain counties in New Jersey but excluding staff pharmacists and supervising pharmacists from the unit], but excluding guards, store managers, co-managers, pharmacy managers, supervising pharmacists, pharmacist-in-charge, New Jersey staff pharmacists and pharmacy interns, and supervisors as defined by the National Labor Relations Act, as amended, in respect to rate of pay, wages, hours and other conditions of employment.

The contract was extended through several memoranda of agreement, and at the time of the hearing, continued in effect. Section 23 of the Memorandum of Agreement entered into in October, 2009 which was effective through April, 2015, states that "the employer agrees not to file a unit clarification petition or otherwise seek to remove pharmacists from the bargaining unit before or around the next round of collective bargaining negotiations in 2015."

The March 31, 2015 Session

Bargaining for a new contract began on March 31, 2015. Seventeen sessions were held thereafter. Present for the Union were Allyson Belovin, its attorney, and Laurie Vallone, its executive vice president, other officials and certain of the Respondent's employees. Present for the Respondent was Traci Burch, its senior vice president for labor relations, Gordon Hinkle, its senior labor relations manager, and David Gonzalez, a labor relations manager, and other managers.

The Respondent and the Union presented their proposals that day. Union official Vallone began the first session by stating that the Union made many "sacrifices" in the last contract because the Respondent was in a "precarious" financial position, but inasmuch as the Respondent's economic situation has greatly improved, the Union looked forward to a good contract. Hinkle agreed that the Respondent's financial picture had improved greatly but maintained that it still faced financial challenges which must be addressed.

The Respondent presented its proposals to modify the contract. The proposal at issue here was that the unit description be changed to state that the Union would be recognized as the representative of only certain specified positions, excluding pharmacists and pharmacist interns hired in New York stores after the ratification of the contract.

The effect of this proposed change was to remove future pharmacists and interns from the current recognized unit. Future pharmacists and interns are defined as those hired after the ratification of the contract. As noted above, the contract included pharmacists and pharmacy interns who worked in stores located in New York. The Respondent has for many years told the Union that it wanted to have the pharmacists excluded from the unit.

Respondent's spokesperson Burch told the Union that the removal of future pharmacists and interns from the unit was "tied directly into the economics," explaining that the proposal was a business initiative in which it sought to (a) save money to offset the costs of the National Benefit Fund for Hospital and Health Care Employees (NBF), the Union's plan which funds medical benefits for its members and (b) have pharmacists act as managers.

Burch said that this proposal was based on what is occurring in the industry – the Respondent sought to have the pharmacists "leading" their stores and undertaking supervisory responsibilities. It must be noted that the recognition clause in the 2009 Memorandum of Agreement was amended to exclude supervisory pharmacists and pharmacy managers.

Hinkle testified that the business was growing in different directions and the Respondent needed to have its pharmacists involved with hiring, firing, disciplining and directing other pharmacy employees, and also act as managers in dealing with "wellness initiatives" including counseling of patients, handling customer issues, scheduling, performing outreach into the community and medical therapy management, and not just "counting pills and filling prescriptions." He noted that this "transition" from a pharmacist's "medical dispensing to wellness" began three to five years ago.[1]

Hinkle further stated that in northern California the Respondent successfully negotiated the removal from the unit of pharmacists hired after the ratification of that contract, and it sought to do that here.

Hinkle explained that a typical Rite-Aid pharmacy has a pharmacy manager, a staff pharmacist, pharmacy techs and pharmacy cashiers. On the days that the pharmacy manager is not at work the staff pharmacist is on duty.

Hinkle stated that when the staff pharmacist is at work in the absence of a pharmacy manager, the pharmacist must have supervisory responsibility over the pharmacy techs and

[1] Edsel Geddes, a New York pharmacist, testified to his supervisory duties when he worked in New Jersey. He stated that his inability to discipline other employees for lateness or absences in New York could be very disruptive to the pharmacy's workflow.

cashiers. He noted that a staff pharmacist represented by the Union would be unable to discipline or counsel another employee represented by the Union.

Union attorney Belovin testified that Vallone objected to that proposal which would change the scope of the unit by removing the pharmacists. She noted that the Union was founded by pharmacists. Vallone was quoted by Belovin as saying that such a proposal "was not something we are willing to entertain." She added that the Union "said from the outset that it was not willing to entertain changing the scope of the unit to remove future pharmacists or interns from the unit."

Similarly, Hinkle quoted Vallone as saying that the Union was not willing to listen to such a proposal. Belovin testified that, nevertheless, the Respondent repeated its proposal at every session, giving explanations as to why it sought the exclusion of future pharmacists and interns.

Belovin denied that the Union "shut down discussion" of the proposal, claiming that the Union did not do so because the Respondent continuously repeated it. She also stated that the Respondent did not state that it wanted to have pharmacy interns assume supervisory or managerial duties. She also noted that the Respondent made no specific proposal to add specific job duties to the position of future pharmacists.

Belovin stated that she did not recall Vallone asking what Burch meant concerning that proposal. She further stated that the Union did not make a request for information concerning it and that the Union never made a counter offer to that proposal, other than to have it removed from the bargaining table.

The Respondent made three other proposals which are relevant here:

> 1. It sought to institute "Rediclinics" in its stores. Rediclinics would provide non-emergency healthcare by nurse practitioners or physicians assistants.
>
> 2. It sought to institute the operation of concessions in its stores at its discretion without the Union's consent, and that employees working in those concessions be excluded from the unit. The current contract provided that the Respondent was not permitted to open any concessions in its stores without the Union's consent.
>
> 3. It sought to institute "Central Fill" in which prescriptions brought into a store would be sent to another Respondent's location where they would be filled by non-union pharmacists rather than by the unit members in the store in which the prescriptions were originally brought.

The Union presented its proposals which were discussed.

The April 1 Session

Belovin began the session by stating that the Respondent's proposal regarding future pharmacists and interns was a "nonstarter for the Union." According to Hinkle, Belovin repeated that the Union would not entertain any package that included the removal of future pharmacists or interns from the unit.

The Union expressed a willingness to bargain about the Respondent's ability to establish concessions in the stores if the Union had notice and an opportunity to bargain about it. The Union did not agree to exclude from the unit employees working for the concessions. The Respondent said that it adhered to its four proposals without change.

An off the record discussion took place before the next bargaining session. During that meeting, Belovin explained to Burch and Hinkle that she recognized that the cost of the NBF was very high. She offered to work with the Respondent to find ways to offset that cost. However, she asked for "assurance" from the Respondent that if the Union engaged in that effort the Respondent would withdraw its proposal regarding future pharmacists and interns.

Burch responded that she could not say that the Respondent would withdraw its proposal, adding that she first wanted to see what the Union proposed regarding the cost of the NBF. Belovin repeated that before she undertook the effort to come up with a proposal, she wanted to be certain that the Respondent's proposal would be rescinded. Burch said that she could not make that commitment.

Burch asked Belovin if the Union would consider a change from the NBF to the Respondent's benefit plan. Belovin responded that the Union wanted to maintain the NBF.

The May and June Bargaining Sessions

At the May 5 bargaining session, the Respondent again proposed the removal of future pharmacists and interns from the New York unit. Its Negotiation Summary dated May 5 states "Article 2: Recognition – proposed to remove New York interns and staff RPH [pharmacists] from bargaining unit going forward. Current NY interns and RPH remain in."

At the June 22 session, Vallone remarked that the Union had been successful in obtaining a benefit which the Respondent had long sought. The Union had arranged with the NBF that employees could bring their mail order prescriptions to a Rite-Aid store. The store would send the prescriptions out to be filled and the employee could pick up the drugs at the store. This arrangement benefited the Respondent because it brought employees into the store where they may make other purchases.

Vallone told Burch that in return for this benefit for the Respondent, the Union asked that the Respondent's proposal to remove future pharmacists and interns from the unit be withdrawn. The Respondent refused.

At that session, the Respondent made an "economic proposal" for a one-year contract instead of a four year contract. According to Belovin, the parties had previously tentatively agreed to a four year contract.

The proposal included contributions to the NBF and the other Union Funds for one year. It specifically referred to the New York pharmacists and interns only in the following respect:

> Article 5 - Wages
>
> b. The following minimum hourly wage is hereby established for the categories herein below listed:
>
> 7. Pharmacy Interns Hired Before Ratification of this Agreement: $9.50
>
> 8. Staff Pharmacists Hired Before Ratification of this Agreement: $54.16.

The proposal contained no wage rates for pharmacists and interns hired after the ratification of the contract. Belovin testified that the Respondent's spokesperson stated that the omission of any wage rates for pharmacists and interns hired after the date of the ratification of the agreement was consistent with its original proposal not to have those persons included as part of the unit.

Belovin stated further that the Respondent did not offer to withdraw the future pharmacist and intern proposal if the Union agreed to a one-year contract.

Belovin testified that Hinkle began the session by saying that the Respondent proposed a one year contract in order to give the parties time to "figure out what the situation was" and try to deal with the economics. According to Belovin, later in the session the Respondent proposed a one-year contract because the Union's four year contract proposal was not agreeable to it because of the NBF and its other benefits. Burch said that she was trying to find creative ways to work together but the Respondent could not agree to the Union's economic proposal. She noted that she was not opposed to a four year contract but the economics of such a contract must be dealt with.

Belovin testified that Burch told the Union that there had been no change in its wage proposal from its prior proposal. The Respondent adhered to its proposal that future pharmacists and interns be removed from the New York unit.

Hinkle testified that the Respondent's one-year proposal made that day was to maintain the status quo. The Respondent would pay the requested rates for the NBF and for that year the pharmacists and interns would remain in the unit, and no one would be removed from the unit. However, during that year the parties would attempt to find offsets to the cost of the NBF.

However, the Respondent's written proposal did not expressly provide that the future pharmacists and interns would remain in the unit for that one-year period. Further, Hinkle conceded that the offer did not withdraw its previous requirement that the future pharmacists and interns be removed from the unit. As noted above, Belovin testified that the absence of the future pharmacists and interns from the proposal was consistent with the Respondent's position that they be removed from the unit.

Belovin testified that the one-year proposal did not include a provision that the Respondent would withdraw its proposal to remove future pharmacists and interns from the unit. She added that such a commitment was never communicated to the Union. Hinkle denied Belovin's testimony that the one-year deal included the Respondent's proposal to have future pharmacists and interns removed from the unit. He claimed that the purpose of the one-year contract was to maintain the status quo so that the parties could have additional time to find ways to offset the cost of the NBF.

This, of course, differs from Belovin's view of the Respondent's position. She stated that the proposal's failure to provide for wage rates for the future pharmacists and interns clearly shows that the Respondent made no change in its original proposals that they be removed from the unit. When asked about the omission, Hinkle stated that it was a "cut and paste" prepared by Gonzalez from a previous document.

Hinkle conceded that the Respondent's bargaining notes do not state that it was withdrawing its proposal to eliminate future pharmacists and interns from the unit. He further conceded that the notes state that it is "our intention to remove them in the future." According to

Hinkle, the Respondent intended, after the end of the one-year contract, to seek the removal of pharmacists because it needed them to assume supervisory responsibilities. He conceded, however, that such intent was not reflected in the Respondent's bargaining notes. Those notes do not reflect that the Respondent was changing its proposal to withdraw its proposal that future pharmacists and interns be removed from the unit.

Although Hinkle claimed that the Respondent's proposal for a one-year contract included the current pharmacists and interns in the unit for that one year, the proposal itself did not reflect that. Hinkle conceded as such, and further admitted that the Respondent made no correction to that proposal during bargaining.

The Union's bargaining notes reflect that Vallone remarked that the only change the Respondent made was to offer a one-year contract which was "regressive bargaining" with no other change.

Hinkle testified that he had no opportunity to correct Vallone's remarks because the Union continued talking. However, the Respondent's bargaining notes that day indicate that it continued to insist that future pharmacists and interns be removed from the unit. Moreover, the Union's notes indicate that Vallone asked for an explanation of how the one-year proposal differed from the four-year offer. She asked Hinkle "I have looked at your proposal, and where I am confused can you show me what is different than your proposal the first time. I went over it in detail, I can't see what is different in your economic proposal, and maybe you can help me? Tell me what is different?" Vallone added "the only change you did, in the tentative agreement … you list a 4 year … now you come back with a one year agreement and I call [that] regressive bargaining."

Further, the Union's notes indicate that that session lasted at least five hours – more than enough time for the Respondent's bargainers to interrupt the Union's alleged continuous talking to correct an important part of the one-year proposal – if it was indeed part of that proposal.

Hinkle noted that the Union's charge which alleged that the Respondent engaged in regressive bargaining was withdrawn because the bargaining was not regressive in that it offered a one-year contract that did not include the removal of the future pharmacists and interns from the unit. There was no proof, however, that that was the reason the Union withdrew its charge.

Belovin testified that although the Respondent explained its reasons for a one-year contract, it did not say that it was withdrawing its proposal to remove future pharmacists and interns from the unit.

The Union's original proposal included progressions in the minimum wage for certain job classifications each year until a certain rate was reached, after which employees in that job classification receive an across the board wage raise applicable to all employees.

The Respondent made a proposal to eliminate all progressions and to establish a single minimum rate within a job classification which all employees would receive whatever across the board wage increases were agreed to.

The Union's counteroffer agreed to eliminate all progressions in wage raises for cashiers going forward. The Respondent proposed to eliminate all wage progressions for all employees. The Union responded that it would agree to that proposal in exchange for a four year contract

which included all the Funds, an across the board wage raise and the retention in the unit of the future pharmacists and interns.

The July, August and September Sessions

At the July 15 session, the Respondent spoke about its proposal to modify the layoff and discharge clauses of the contract. Vallone said that she did not want to address that proposal until the Union's Funds were "secured." Burch said that she was waiting for the Union to be responsive to its business needs. The Union again asked that the Respondent withdraw its proposal to remove future pharmacists and interns from the unit and Burch refused.

At the July 16 session, the Respondent claimed that its employees were not using the Training and Upgrading Fund and sought ways to increase their participation in that Fund. The Union made a "package proposal" which included greater participation in the Fund, a four year contract with all the funds secured, and the inclusion of the future pharmacists and interns in the unit. In addition, the Union would permit the Respondent to engage in the Central Fill procedure it proposed if it did not result in any layoffs, and would also agree that the Respondent establish Rediclinics with the understanding that the Union would not seek to add employees to the unit, such as nurse practitioners and physicians assistants who had not historically been part of the unit.

At the August 11 session, the Respondent submitted a written proposal dated August 3. It offered a four year contract with participation in the NBF at the same rates as provided in the League of Voluntary Hospitals contract. However, its contribution to the NBF was conditioned on the Union's agreement that (a) the Respondent's delinquent retroactive contributions to the Funds be waived and (b) Employer contributions not be made based on overtime wages.

The Union refused to agree to those conditions because the Funds and not the Union could waive delinquent contributions, and it was the Funds' rules, not the Union's, which required that contributions be made based on overtime wages.

The proposal further provided that the Respondent:

a. Holds on its proposal to eliminate the staff pharmacist position form the bargaining unit going forward. All current staff pharmacists shall remain in the union, and

b. Holds on its proposal to remove all interns from the bargaining unit.

Belovin noted that this proposal differed from previous offers in that it proposed that all interns be removed from the unit, not all future interns as had been provided in prior proposals. However, she stated that, during the bargaining, the Respondent's proposal was clarified to state that it referred to future interns.

Both Burch and Gonzalez said that the Respondent maintained its proposal that future pharmacists and interns be removed from the unit.

Hinkle testified that at the August 11 session, Burch said that the NBF was very costly, estimated at $35 million. She said that in order to assume that cost over the four year contract, the Respondent needed something to offset that expense. She suggested that offsets would include its proposed business initiatives of opening a Central Fill location and Rediclinics.

According to Hinkle, Burch described the removal of future pharmacists and interns from the unit as another business initiative it sought. The Union said that it was not interested in the latter proposal.

The Union responded that the change in the scope of the unit to remove future pharmacists and interns from the unit was a "nonstarter," and that there could not be a contract that excluded those classifications. The Union asked the Respondent to withdraw that proposal and that it would then speak about the Respondent's "real business needs."

According to Belovin, Burch said that it was difficult for her to address the Union's economic proposals when the Union had not addressed its business initiatives. According to Belovin, for the first time, Burch identified three of its prior proposals as "business initiatives" - Rediclinics, Central Fill and the removal of future pharmacists and interns from the unit.

Belovin noted that Burch commented that it was very important to the Respondent that pharmacists manage the store's business and that it "doesn't work to have managers in the Union."

At the August 12 session, the Union asked for a response to its last economic proposal. Burch replied that she could not respond because the Union had not addressed the Respondent's three business initiatives: Rediclinics, Central Fill and the removal of the future pharmacists and interns from the unit. As to the last initiative, Burch repeated that pharmacists were managers who should be performing managerial duties and should not be in the unit. The Union again insisted that that proposal be withdrawn and that it would then address the Respondent's business initiatives.

After this session the Respondent sent its employees an update of the bargaining. It stated, in relevant part:

> Question: Why does Rite-Aid want Interns and Future Pharmacists out of the Union?
>
> FACT: The business of pharmacy is changing in retail. To keep up with the changes, we need our pharmacists to actively participate in managing our stores and new business initiatives. Managers are never part of a Union. Interns will someday be Pharmacists, so they should be treated like management, too.

At the September 16 session, Belovin presented a "package proposal" pursuant to which the Union would agree to permit the Respondent to have a Central Fill procedure even if it resulted in layoffs. The Union repeated its agreement to permit Rediclinics if the Respondent gave the Union notice and an opportunity to bargain over the effects of that new operation. The Union also agreed to exclude from the unit those classifications of professional Rediclinic employees who had historically not been included in the unit. However, the Union refused to agree to a waiver of retroactive contributions to the NBF and would not agree that contributions not be made on overtime wages.

Belovin asked whether a contract settlement was possible within those parameters. Burch replied that the Respondent needed all three initiatives.

The November and December Sessions

At the November 17 session the Respondent presented a written economic proposal which was identical to that presented at the August 11 session: the removal from the unit of future pharmacists and the removal from the unit of "all interns."

Belovin testified that Gonzalez said that the offer was "contingent on agreement by the Union to all three of Rite Aid's business initiatives," one of which was the removal from the unit of the future pharmacists and interns. He said that it was also contingent on the waiver of retroactive contributions and that no contributions be made on overtime wages. Gonzalez added that if all three were not agreed to, "then this is not the offer." Finally, Gonzalez said that its offer was contingent on the agreement being ratified by late December.

Belovin asked whether the proposal regarding NBF was contingent upon the waiver of retroactive contributions and no contributions on overtime and Gonzalez said that it was.

Belovin testified that she replied that the proposal was contingent on a number of things that the Union "can't and won't agree to" including the proposal to remove future pharmacists and interns from the unit.

Belovin quoted Vallone as saying that the Union could not waive the retroactive contributions to the NBF. She also quoted Vallone as remarking that the Respondent's proposal regarding wages was very close to the Union's proposal, and that while the Union had agreed to the Respondent's Central Fill and Rediclinics proposal, the Union believed that the future pharmacists and interns' proposal was not a business initiative but was instead "union busting." Burch disagreed with that characterization.

The Union agreed to present a counteroffer at the next session which would not include an agreement to eliminate future pharmacists or interns from the unit. Burch replied that in exchange for the Respondent's agreement on NBF it was "insisting on all of its business initiatives," adding that she would not meet the Union's demands without the business initiatives.

At the November 19 session, the Union presented a proposal in which it agreed to nearly all the Respondent's demands regarding the Training and Upgrading and Child Care Funds. It accepted the Respondent's wage proposal in its entirety, and also agreed to make significant modifications to the discharge and layoff contract clauses. Belovin testified that Gonzalez thanked the Union for the proposal which, according to him, "came a long way towards getting a final contract." Indeed, in its brief the Respondent states that in the final four bargaining sessions, the parties "reached a tentative agreement on wages, aspects of grievance and discipline language, prior benefits language, drugfree workplace language, and changes to the training fund and outreach programs."

According to Belovin, Gonzalez said that the Respondent would not withdraw its business initiatives proposal which included the removal of future pharmacists and interns from the unit. Belovin said that the Union's agreement to the Respondent's Central Fill and Rediclinics proposals was contingent on a four year contract with the Funds being secured and the maintenance of the scope of the unit as is, without the removal of the future pharmacists and interns. She repeated that such a proposal was not a business initiative, but was an example of "union busting."

Hinkle stated that Burch denied the "union busting" charge, noting that the Respondent simply wanted its pharmacists to take on additional roles. According to Belovin, Burch restated that the stores must be managed and pharmacists needed to act as managers. Hinkle stated that Burch added that the management role that pharmacists should have was inconsistent with their being union members, and that the Respondent sought to have its pharmacists take on supervisory roles.

On November 23, 2015, the Respondent submitted a position statement in response to the Union's charge of bad faith bargaining. That charge is not before me. In its statement, the Respondent stated:

> Rite Aid's proposal agreed to the majority of the union's economic demands in exchange for the Union's accepting certain business initiatives, including the removal of Interns and Pharmacists from the bargaining unit on a going forward basis. Only as regards to this one particular package has Rite Aid conditioned its acceptance of some mandatory subjects on the Union's acceptance on a permissive subject."

A federal mediator was present at the December 15 session. Belovin told him that the Union's major concern was with the NBF and the other Funds. She advised the mediator that the Respondent made continued participation in the Funds contingent upon things that the Union was unable to agree to including a waiver of retroactive contributions, no contributions on overtime wages and the removal of future pharmacists and interns from the bargaining unit.

Belovin told him that the Union had already agreed to two of those proposals, Rediclinics and Central Fill, and the elimination of progressions. She also noted that the Union had made significant modifications to the layoff and discharge language of the contract.

The mediator reported to the Union that the Respondent posited the problem in negotiations as the Union's refusal to bargain over the scope of the unit or over the methodology of the Funds, which made the economics "untenable." Belovin told the mediator that the Union would consider a reduced economic package in exchange for an assurance that the Respondent would withdraw its proposal on the future pharmacists and interns.

Belovin stated that the mediator also reported to the Union that the Respondent refused to withdraw its proposal concerning the future pharmacists and interns, adding that it would agree to the Union's Funds proposal but that it must "sacrifice" the pharmacists. Belovin refused to do that. Hinkle denied that the Respondent told the mediator that, explaining that its proposal related to future pharmacists and interns who were not yet in existence so they could not be "sacrificed."

When the parties met following their separate sessions with the mediator, Vallone said that the Union and the pharmacists were not "going away …it's not going to happen now or ever." The Union offered a reduced wage package to offset the cost of the NBF. A tentative agreement was made to a 3% across the board wage increase in each year of the contract.

The Final, March 29, 2016 Session

The mediator was present at this session. Burch asked whether (a) new employees could enroll in a medical plan other than the NBF (b) the Funds would give the Respondent a credit for those employees who did not enroll in the NBF (c) employees could make

contributions to the NBF through payroll deductions and (d) the Union had any other ideas for offsetting the costs of the NBF.

Belovin answered "no" to all the questions but indicated the Union's willingness to work with the Respondent to find ways to offset the cost of the NBF. She said that she recognized that the NBF is expensive but the Respondent's proposal to eliminate future pharmacists and interns from the unit was problematic. She said that the Union "repeatedly" told the Respondent that the Union was not required to bargain over that issue, and that the Respondent's insistence on that proposal was interfering with the Union's ability to bargain about anything else. She urged Burch to take that proposal off the table and then "we can move on."

Hinkle stated that Belovin denied that the Union had any obligation to bargain over that proposal, saying that the Union would not entertain that proposal and would not bargain with the Respondent over the scope of the unit.

Burch refused to take the proposal off the table. She stated that "it's linked to the NBF. We're insisting on that proposal." Belovin asked her to make a proposal which did not include the removal of the future pharmacists and interns from the unit. Burch refused to do so because of the Union's insistence on retaining the NBF and its refusal to consider a substitute medical plan.

Belovin stated that she answered that the Union wanted the Respondent to continue to participate in the NBF but would consider any proposal the Respondent offered.

Hinkle testified that Belovin asked if there was any contract Burch was willing to sign that did not include removal of the future pharmacists and interns. Burch answered "no," explaining that as long as the Union continued to propose that the Respondent must stay in the NBF with no offsets to the $35 million increase in cost over the four years of the contract, the Respondent would not agree to accept the NBF under those terms. Accordingly, the Respondent insisted on its business initiatives which included removing the future pharmacists and interns from the unit.

The parties discussed the program, referred to above, in which the Union arranged to have the Respondent's employees submit their mail order prescriptions at a Rite-Aid store which would then mail the prescription to the NBF and the drug could be picked up at the store by the employee.

The Respondent asked that the Union and the NBF designate the Respondent's stores as the only ones to which employees could present their mail order prescriptions. Vallone asked the Respondent to withdraw its proposal regarding the future pharmacists and interns and that she would speak to the Funds regarding the Respondent's request for exclusivity.

Belovin testified that Burch replied that if the Union wanted the NBF "then we need to take the pharmacists and interns out of the unit."

The Respondent again requested that employees make contributions to the NBF through payroll deductions. The Union's bargainers replied that this was something the Union has not done, but in the interest of reaching agreement on a contract they could contact the highest Union officials and make such a request if they received assurances from the Respondent that if they sought such approval the Respondent would withdraw its proposal to remove future pharmacists and interns from the unit.

While Burch did not say that the Respondent would withdraw its proposal if the Union obtained such approvals, she told the Union that it would be "worthwhile" for it to seek to obtain the Union's agreement.

Hinkle testified that the Union continued to state that it was not interested in the Respondent's proposal to remove the future pharmacists and interns from the unit. The Respondent asked the Union if it would entertain any other offsets that could change the Respondent's $35 million NBF cost. The Union agreed to ask whether Union officials would permit employees to make a contribution toward the NBF. Thereafter, the Union informed the Respondent that that could not be done and the Union was not interested in the Respondent's proposals. Hinkle further stated that the Union did not offer any other offsets to that "economic challenge."

III. Events Following the March 29 Session

On April 21, Vallone wrote to the Respondent that it would not modify its proposal regarding the NBF and maintained its proposal that the Respondent continue to contribute to that Fund. Vallone further stated that the Union was not willing to bargain over any changes to the contract's recognition clause that would modify the scope of the unit to exclude pharmacists or interns.

Gonzalez replied to the letter, stating that the Respondent was "not seeking to modify the scope of the bargaining unit to exclude pharmacists or pharmacy interns." He stated that "as we have explained repeatedly during bargaining, retail pharmacists should not be mere pill counters; as such we have proposed to remove future pharmacists and interns from the unit, so that they may properly be engaged in management and supervisory responsibilities, in addition to their current bargaining unit functions. Because future pharmacists and interns will become 2(11) statutory supervisors, they will of course also be excluded from the bargaining unit, consistent with the CBA's recognition clause." He concluded by stating that despite Vallone's unwillingness to bargain, the Respondent believed that the Union had a good faith obligation to negotiate over this proposal.

Hinkle testified that Vallone's letter did not accurately reflect the Respondent's bargaining proposal. The letter claimed that the Respondent sought to modify the scope of the unit to exclude future pharmacists and interns but, according to Hinkle, the Respondent did not seek to modify the scope of the unit. Rather, the Respondent's proposal to remove future pharmacists and interns from the unit was a transfer of work, noting that it sought to transfer work because it wanted the pharmacists to continue doing the same work and, in addition, assume supervisory responsibilities.

However, Belovin testified that the Respondent did not make a proposal regarding the transfer of unit work or even refer to the transfer of such work during the negotiations. Indeed, Hinkle testified that there was no discussion during bargaining concerning whether its proposal was a modification of the scope of the unit because the Union refused to entertain the proposal and would not discuss "anything" until the Respondent took it off the table.

Belovin stated that during negotiations, when she referred to the Respondent's proposal to modify the scope of the unit by excluding the future pharmacists and interns, the Respondent's agents did not correct her in her assertion that this was a "scope of the unit" issue. Indeed, Belovin quoted Burch as saying that the Union would not bargain over the "scope of the unit." According to Belovin, this was an acknowledgement by the Respondent that this was a "scope of the unit" issue and not a "transfer of work" issue.

Hinkle conceded that the Respondent's proposal did not specify "work." He further conceded that during the bargaining sessions the Respondent's agents did not use the words "transfer of work." Rather, they explained what work the Respondent wanted the future pharmacists and interns to perform. He stated that the Respondent did not make any written explanations about the transfer of work because each time it tried to discuss it the Union said that it was not interested in the proposal

Hinkle conceded that the Respondent's proposal would not take the work that the New York pharmacists did and transfer it outside the unit. Indeed, during bargaining the Respondent did not describe any task performed by current pharmacists that it sought to reclassify as non-bargaining unit work. However, Hinkle maintained that the work of the future pharmacists and interns would be removed from the unit.

Hinkle noted that the Respondent did not seek to remove a classification from the unit because the classification exists as "staff pharmacists." Rather, the Respondent sought to transfer unit work and he conceded that it is required to negotiate the issue of transfer of work.

Hinkle stated that the Union's main issue was the maintenance of the NBF without change, and its desire to have the Respondent agree to the changes that the League of Voluntary Hospitals agreed to. He noted that the Union did not agree to an alternative to the NBF or the creation of a new, less expensive Fund. In fact, according to Hinkle, the Union rejected all of the Respondent's ideas and did not offer any proposal to reduce or offset the economic cost of the NBF.

Hinkle testified that the Respondent's priorities are its business initiatives including Rediclinics, Central Fill locations and the future pharmacists and interns.

Hinkle stated that the Respondent never conditioned its proposal regarding future pharmacists and interns to an agreement on the NBF. However, he maintained that the Respondent linked its three business initiatives to the Union's NBF proposal. He noted that, in addition to the Respondent's belief that its pharmacists are supervisors and must act as such, its linkage relates to the cost of maintaining the pharmacists and interns in the unit. He explained that removal of the future pharmacists and interns from the unit will result in less cost because it would not have to contribute to the NBF in their behalf. He further stated that he expected that the pharmacists would have a positive impact on store sales since they would be leading new initiatives and acting as wellness store leaders. Such improvement in store sales would help the Respondent offset the costs of the NBF.

Belovin testified that the Respondent's bargaining agents at no time during negotiations said that the Respondent would withdraw its proposal to eliminate future pharmacists and interns from the unit, and the Respondent never made a proposal that did not include the elimination of future pharmacists and interns from the unit.

On June 2, 2016, the Respondent wrote to the Union that the Union has "shut down all discussion of Rite Aid's proposal from the beginning of negotiations."

IV. The Positions of the Parties

The complaint alleges that the Respondent failed to bargain in good faith with the Union by insisting, as a condition of reaching any collective-bargaining agreement, that the Union agree to remove newly hired interns and pharmacists working in stores in New York State from

the bargaining unit.

The General Counsel asserts that the issue of the removal of positions from a bargaining unit constitutes a change in the scope of a unit, a permissive subject of bargaining as to which a party is not required to bargain.

The Respondent makes several arguments. First, it contends that its proposal to remove the future pharmacists and interns from the unit is an issue concerning a transfer of bargaining unit work out of the unit, a change in the terms and conditions of employment and thus a mandatory subject of bargaining, and not a scope of the unit issue. Second, it asserts that it did not insist on the removal of the positions at issue from the bargaining unit. Third, it maintains that it was permitted to link or package a permissive subject of bargaining, the removal of the future pharmacists and interns from the unit, with economic terms which are mandatory subjects of bargaining.

Analysis and Discussion

I. Permissive or Mandatory Subject of Bargaining

Section 8(d) of the Act defines the scope of the duty to bargain collectively as encompassing "wages, hours, and other terms and conditions of employment." Those are the mandatory subjects of bargaining—the ones over which a party must bargain if requested to by the other party.

"Permissive" subjects of bargaining are those not involving wages, hours, or other terms and conditions of employment. Parties may bargain over those subjects if they choose to do so. Because neither party is required to bargain at all over a permissive subject, a party may not lawfully bargain to impasse over a permissive subject. *Antelope Valley Press,* 311 NLRB 459, 460–62 (1993).

The Board has long held that "bargaining unit description clauses, sometimes called bargaining unit scope clauses, are nonmandatory bargaining subjects." *Bremerton Sun Publishing Co.,* 311 NLRB 467, 474 (1993) and cases cited therein.

In *Hill-Rom Co., Inc., v. NLRB,* 957 F.2d 454, 457 (7th Cir. 1992), the court defined permissive subjects of bargaining as those "which fall outside the scope of Section 8(d) of the Act and cannot be implemented by the employer without union or Board approval." The court stated that "there is no doubt that the scope of the employees' bargaining unit is a permissive subject of bargaining, regardless of whether the unit has previously been certified by the Board or voluntarily agreed upon by the parties."

II. The Alleged Transfer of Work out of the Unit

The Respondent also argues that its proposal at issue is not a proposal to modify the scope of the bargaining unit but is a proposal to transfer work out of the unit to the future pharmacists and interns who will be performing work as statutory supervisors.

The Respondent correctly notes that the transfer of work outside the bargaining unit is a mandatory subject of collective bargaining, and the employer's right to effect such a lawfully motivated transfer after impasse is not negated by a showing that upon such a transfer, a job classification within the unit will have no incumbents and, therefore, will be dormant at best. *Hill-Rom Co*., 297 NLRB 351, 357–59 (1989).

But as the Board held in *Somerset Valley Rehabilitation and Nursing Center*, 364 NLRB No. 43, slip op. at 4 (2016), eliminating a unit classification alters the scope of the unit, and such an action is a permissive subject of bargaining. See, e.g., *Shell Oil Co.*, 194 NLRB 988, 995 (1972). Accordingly, once a specific job has been included in the bargaining unit, it cannot be removed from the unit absent the union's consent or a Board order. *Wackenhut Corp.*, 345 NLRB 850, 852 (2005).

Similarly, in *Aggregate Industries*, 359 NLRB No. 156 (2013), the Board stated that "an employer may not, under the guise of transferring unit work, alter the scope of the bargaining unit. *Facet Enterprises, Inc. v. NLRB*, 907 F.2d 963, 975-976 (10th Cir. 1990); *Newport News Shipbuilding v. NLRB*, 602 F.2d 73, 77-78 (4th Cir. 1979). The Board has rejected attempts by employers to characterize a change in unit scope as a transfer of work when the same employees continue to do the work. See, e.g., *Beverly Enterprises, Inc.*, 341 NLRB 296, 296 (2004) ("the same employees continue to do the work. The respondent attempted to change the scope of the bargaining unit by taking the position that these represented employees and their work were now outside the bargaining unit."); *Bay Shipbuilding Corp.*, 263 NLRB 1133, 1140-1141 (1982).

However, Hinkle conceded that the Respondent's written proposals did not refer to the work duties of the future employees or a transfer of work out of the unit. Indeed, Hinkle stated that "in my opinion, we're transferring work because we want them to continue doing the same work. In addition to that take on supervisory functions." Nevertheless, Belovin testified that the Respondent did not make a proposal regarding the transfer of unit work or even refer to the transfer of such work during the negotiations.

The Respondent's proposal was always that the pharmacists and interns be excluded from the unit. However, it must be noted that in its claim that future employees would assume supervisory responsibilities the Respondent only referred to the pharmacists and not the pharmacy interns as taking on that role. Thus, Hinkle testified that the Respondent's business model contemplated that in the absence of the pharmacy manager it was expected that the "pharmacist," not the pharmacy intern, would supervise the other store employees.

Thus the Respondent's argument that its proposal contemplated the transfer out of the unit of employees who were expected to exercise supervisory duties cannot stand because the interns, who were also to be removed, were never intended to perform supervisory duties upon their exclusion from the unit.

In attempting to accommodate the rights of the parties concerning questions of a change in the scope of the unit versus the employer's right to transfer work out of it, the Board has stated that it will first determine whether the employer has insisted on a change in the unit description. It held that "in accord with long-established precedent, we shall continue to find any such insistence to be unlawful, even if the unit is described in terms of work performed. The union is the representative of the employees who currently perform the work. A proposal to change the actual unit description clause would raise questions regarding the union's right to represent those employees. The employer consequently may not insist on such a proposal." *Antelope Valley Press,* above.

Here, inasmuch as the Respondent has insisted on a change in the unit description, the removal of the future pharmacists and interns therefrom, a violation has been proven.

The Board has acknowledged that "it is sometimes difficult to determine whether a change affecting a classification of unit employees is an alteration in the scope of the unit or a transfer of unit work. See *Antelope Valley Press*, 311 NLRB 459 (1993).

Where the employer effectively eliminates positions by reclassifying unit, nonsupervisory positions as supervisory positions in order to remove them from the bargaining unit, the employer alters the scope of the unit.

In *Holy Cross Hospital*, 319 NLRB 1361, 1364-1365 (1995), the employer created a supervisory shift manager's position. That position, which was not part of the unit, included many of the duties of the existing house supervisors. The employer's plan resulted in the virtual elimination of the unit house supervisor position. The Board, citing *Hill-Rom,* above, noted that the employer's action resulted in the "virtual elimination of the house supervisor position," adding that "once a specific job has been included within the scope of the unit by either Board action or the consent of the parties, the employer cannot remove the position without first securing the consent of the union or the Board." 319 NLRB at fn. 2. Accordingly, the Board held that the employer's action was a scope of the unit question and not a transfer of work issue.

In *Mt. Sinai Hospital*, 331 NLRB 895, 908 (2000), the Board found that by reclassifying unit sous chefs as non-unit supervisors, the employer "altered the scope of the unit and violated Section 8(a)(5) and (1) of the Act." The Board emphasized that the employer reclassified the existing unit position in order to remove it from the bargaining unit. It further noted that the employees "continued to perform essentially the same work they had previously performed." Here, too, it is contemplated by the Respondent that the pharmacists would continue to perform their regular work while, in addition, they would perform supervisory duties. Accordingly, the Respondent did not create a new position but reclassified an existing, unit job.

The Respondent's reliance on *Hampton House*, 317 NLRB 1005 (1995) is misplaced.. After the union demanded that certain LPNs be terminated for nonpayment of dues, the employer promoted them to a new position of LPN supervisor and insisted that they were no longer in the unit. The LPN supervisors continued to perform the work they had done as unit LPNs, although they were assigned additional supervisory responsibilities.

The Board held that the effect of the employer's conduct was to transfer work out of the unit and not a change in the scope of the unit caused by the promotion of the LPNs to supervisors. The Board further held that when an employer promotes an employee to a supervisory position and the new supervisor continues to perform former bargaining unit work, the work is removed from the bargaining unit. That is a change in the bargaining unit's terms and conditions of employment, giving rise to the employer's bargaining obligation under Section 8(d) of the Act.

The distinguishing feature of *Hampton House* and the instant case is that, in *Hampton House* the employer created a new position, that of LPN supervisor. Here, the Respondent did not propose the creation of a new position. It simply reclassified the existing position of pharmacist to that of supervising pharmacist for the New York stores. Accordingly, by doing so the Respondent seeks to change the scope of the unit. *Mt. Sinai*, above.

The Respondent's reliance on *Wackenhut Corp*., 345 NLRB 850, 851(2005), is also misplaced. In that case, the employer employed unit member "security officers" and non-unit "lieutenants" among other classifications, to protect a nuclear power plant. The security officers and lieutenants performed CAS/SAS operations.

In negotiations with the union, the employer proposed that all its security officers would become lieutenants who would be non-unit supervisors. It posted "new supervisory positions." Fifteen employees were promoted from the unit to the new supervisory positions.

The Board held that the employer violated Section 8(a)(5) and (1) of the Act by eliminating the CAS/SAS operators from the bargaining unit and by reclassifying the CAS/SAS operators as nonunit lieutenants. The Board noted that the employer violated the Act when it "unilaterally removes a position from a bargaining unit, without first securing the consent of the bargaining representative or the Board.

In *Bridgeport and Port Jefferson Steamboat Co*., 313 NLRB 542, 544 (1993), also relied on by the Respondent, the Board held that the employer's conferring supervisory responsibilities on the captains of its boats did not violate Section 8(a)(5) and (1) because the employer did not seek to undermine the Union. Rather it represented a "sincere effort to provide onsite supervision of its vessels through the performance of supervisory duties by its captains."

The Board held that the assignment of supervisory duties to captains was not an alteration of the scope of the bargaining unit, but rather a mandatory subject of bargaining.

The Board stated that the "duties of the captains who were promoted to supervisors had changed. The Respondent did not merely retitle bargaining unit employees who, despite the classification change, would merely have continued to perform solely bargaining unit work. Instead, the Respondent required the captains to perform supervisory tasks and imbued them with the authority of statutory supervisors and managers-powers and responsibilities that they had not clearly exercised in the past."

Thus, *Bridgeport* stands for the proposition that the promotion of unit employees to supervisory positions and who perform purely supervisory duties is a mandatory subject of bargaining and not an alteration of the scope of the bargaining unit.

Here, however, the Respondent's plan for the future pharmacists was to have them continue to perform their current pharmacist's duties and, in addition, assume supervisory responsibilities. Hinkle's testimony and Gonzalez' letter in reply to Vallone confirmed that the supervisory duties of the future pharmacists were "additional" duties to those they already exercised. This, this case differs from *Bridgeport* in that the pharmacists are intended to perform their regular duties in addition to supervisory roles.

I also note that in *Bridgeport* and the cases cited therein, an *actual*, demonstrated need for unit employees to perform supervisory responsibilities was established by those employers. Here, the Respondent set forth, at most, a speculative need for such an addition to their duties. Thus, the New York stores had operated for many years with just a supervisory pharmacy manager in charge. The New York pharmacists never had supervisory duties.

In *Aggregate industries,* above, the Board held that by unilaterally moving a classification of drivers and the work they performed from coverage under one contract to coverage under a less-favorable contract, the Respondent violated the Act. It found that the employer's movement of the drivers was a change in the scope of the bargaining unit--a permissive subject of bargaining--and therefore could not be implemented without first reaching agreement with the union. The Board further found that even if the Respondent's action was properly characterized as a transfer of unit work, and therefore constituted a mandatory subject of bargaining, the respondent violated the Act by acting without giving the union sufficient notice and an opportunity to bargain concerning the change.

Based on the above, I find that the Respondent, in proposing that future New York pharmacists and interns be excluded from the bargaining unit in fact proposed an alteration in the scope of the unit, a permissive subject of bargaining, and not a transfer of work from the bargaining unit.

III. The Respondent's Insistence on the Exclusion from the Unit of the Future Pharmacists and Interns

It has consistently been held that although a party may bargain regarding a permissive subject it is not required to do so. While the parties are permitted to bargain over a change in the scope of a unit, they are not obligated to do so. Each party is free to make proposals on nonmandatory subjects, "to bargain or not to bargain, and to agree or not to agree." However, a party may not insist upon agreement to a nonmandatory subject as a condition precedent to entering any collective-bargaining agreement. Such conduct violates Section 8(a)(5) because it is "in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining." *NLRB v. Borg-Warner Corp*., 356 U.S. 342, 349 (1958).

Here, the Respondent continually, at each bargaining session, repeated its demand that the future pharmacists and interns be excluded from the contract being negotiated. At each session the Union repeated its refusal to consider or even speak about the Respondent's proposal as it was a permissive subject of bargaining. The Union continually asked the Respondent to withdraw its proposal but the Respondent refused to do so.

In *Borg-Warner*, the Court noted that the employer, as here, made its offer of a contract "contingent" on the union's acceptance of the nonmandatory terms. Also, as here, the union asked the employer if it would withdraw its demand for the permissive subject. Here, the Union also asked the Respondent if it would make any other offer that did not include the exclusion of the future pharmacists and interns from the unit and the Respondent replied that it would not.

The Board, citing *Borg-Warner Corp*., above, found that a union unlawfully refused to bargain with an employer by insisting that a previously excluded class of employees be included in the unit. *District 50, United Mine Workers of America,* 142 NLRB 930, 939 (1963). Similarly, an employer's insistence that shipping and receiving clerks be excluded from the unit in the face of the union's "repeated rejection of the proposal" constituted the employer's insistence on its proposal. The Board held that it is well settled that a violation of Section 8(a)(5) occurs if one party insists upon such a change as a condition to finalizing a contract. *Antelope Valley Press,* above, at 460-462.

The Board has long held that it is unlawful for a party to condition its agreement concerning a mandatory subject of bargaining on the union's consent to a nonmandatory subject. *Borg-Warner*, above; *Smurfit-Stone Container, 357* NLRB 1732, 1735-1736 (2011).

In *Smurfit-Stone*, the Board reposed the question decided in *Borg-Warner*: "The proper legal test in this case for unlawful insistence under *Borg-Warner* is "whether agreement on the mandatory subjects of bargaining [was] conditioned on agreement on the nonmandatory subject of bargaining." The Board found that the employer unlawfully refused to bargain by conditioning any agreement upon the union's consent to a nonmandatory subject.

An element in a finding of unlawful insistence is where the objecting party has refused to bargain over the nonmandatory subject. *Laredo Packing Co*., 254 NLRB 1, 19 (1981). Here it is

undisputed that the Union repeatedly refused to bargain over the exclusion of the future pharmacists and interns from the bargaining unit.

A party may not insist on the acceptance of a nonmandatory proposal as a condition of reaching agreement once the other party has refused to bargain over the nonmandatory subject. See *KCET-TV,* 312 NLRB 15, 1–16 (1993); *Laredo Packing Co.*, 254 NLRB 1, 19 (1981).

> The controlling factors in determining whether a party insisted unlawfully upon a subject in the course of bargaining are (1) whether the demand was on a mandatory or voluntary subject of bargaining and (2) whether the insisting party persisted in demanding the nonmandatory provision in the face of continuing rejection by the other party. Furthermore…it is sufficient that the nonmandatory subject be one of the subjects preventing agreement on a contract; it need not be the sole issue remaining unresolved. *National Fresh Fruit and Vegetable Company and Quality Banana Co., Inc*., 227 NLRB 2014, 2015, (1977).

It is therefore well established that a party "ha[s] a right to present, even repeatedly, a demand concerning a non-mandatory subject of bargaining, so long as it [does] not posit the matter as an ultimatum." *Longshoremen ILA v. NLRB*, 277 F.2d 681, 683 (D.C. Cir. 1960); *Detroit Newspaper Agency*, 327 NLRB 799, 800 (1999).

I reject the Respondent's contention that it did not insist that the Union agree to its proposal to exclude future pharmacists and interns from the unit in the contract being negotiated. Belovin credibly testified that Gonzalez said during bargaining that its offer was "contingent" on the Union's agreement to all three of its business initiatives. Gonzalez did not testify and therefore did not contradict Belovin's testimony that he made the Union's agreement to the removal of the future pharmacists and interns "contingent" on agreement to the other terms of the proposal.

In addition, as set forth above, the Respondent's position statement maintains that "as to this one particular package [the three business initiatives] Rite Aid conditioned its acceptance of some mandatory subjects on the Union's acceptance on a permissive subject."

In order to rebut the General Counsel's evidence that the Respondent insisted on the removal of the future pharmacists and interns from the unit, the Respondent claims that it offered a one-year contract maintaining the "status quo."

Hinkle testified that the Respondent's one-year proposal was intended to retain the future pharmacists and interns in the unit for the one year term of the proposed contract. However, I find that such a claim is contradicted by documentary and other evidence.

As set forth above, the written proposal did not expressly provide that the future pharmacists and interns would remain in the unit for that one-year period. Further, Hinkle conceded that the offer did not withdraw the Respondent's previous requirement that the future pharmacists and interns be removed from the unit. As noted above, Belovin testified and I agree that the absence of the future pharmacists and interns from the proposal was consistent with the Respondent's position that they be removed from the unit.

Further proof that the one-year proposal did not include the future pharmacists and interns is seen in the absence therein of any wage rates for those two classifications. Hinkle's attempt to blame the absence of any reference to the future pharmacists and interns on Gonzalez' "cut and paste" preparation of the proposal falls short of establishing that the one-year proposal, in fact, preserved their presence in the unit that year.

In addition, as noted above, the Respondent's bargaining notes contemporaneously recorded that day state that it continued to insist that future pharmacists and interns be removed from the unit. In this regard, the Respondent's attempt to disavow Gonzalez' notes of the bargaining meetings on the ground that they differed from Hinkle's post-meeting testimony must be rejected. Contemporaneous notes taken at the meetings must be regarded as more reliable than testimony received one year later.

I reject Hinkle's testimony that the Respondent did not have an opportunity to correct Vallone's challenge that he explain how the proposal differed from its prior offer. That session consumed at least five hours – more than enough time for its agents to interject that the one-year proposal included the retention of the two categories of employees in the unit for that one year. Moreover, as set forth above, Vallone practically begged Hinkle to explain how the Respondent's one-year contract proposal differed from its prior four-year offer. Hinkle could not do so and he definitely did not state that the pharmacists and interns would remain in the unit that year.

I accordingly find and conclude, as alleged, that the Respondent insisted on the exclusion of the future pharmacists and interns from the unit as a condition of its agreeing to a contract containing mandatory terms and conditions of employment.

IV. Linkage of the Permissive Subject with the Mandatory Subject of Bargaining

The Respondent maintains that it was permitted to link or package a permissive subject of bargaining, the removal of the future pharmacists and interns from the unit, with economic terms which are mandatory subjects of bargaining. The Respondent identified the mandatory subject of bargaining as its seeking offsets to the NBF and the Union's agreement to its three business initiatives.

The Board has held that a nonmandatory bargaining subject may become mandatory based on the nature of its relationship with mandatory subjects under negotiation. It has held that a "sufficient nexus" between the permissive subject and the mandatory subject may convert the permissive subject into a mandatory subject for bargaining. *Smurfit-Stone,* above at 1734.

However, the Board emphasized that the permissive subject must be "so intertwined with and inseparable from the mandatory terms and conditions for the contract currently being negotiated as to take on the characteristics of the mandatory subjects themselves." *Smurfit Stone*, above, at 1734, citing *Sea Bay Manor Home for Adults*, 253 NLRB 739 (1980).

The Board has considered linkage where a proposal that employees sign a general liability release upon receiving severance pay, a nonmandatory subject, is linked with a severance pay proposal, a mandatory subject. The question was whether the connection between the two was sufficient to convert the permissive subject to a mandatory subject of bargaining. The Board also considered whether the proposal for a release was "sufficiently specific to the employer's potential liability arising out of the layoffs that a cost/benefit linkage with severance pay was evident." *Smurfit-Stone,* above.

It must be noted that such a finding of a nexus of a permissive subject to a mandatory subject is "rare." The Board noted that simply offering the nonmandatory term as a "quid pro quo" for the mandatory term was insufficient to establish the necessary nexus. In that case the Board noted that simply "pairing the two would become a device to circumvent the general rule that one may not insist on a [permissive subject] to impasse." *Smurfit-Stone*, above.

I cannot find that a sufficient nexus has been established between the permissive subject, the proposal to exclude the pharmacists and interns from the unit, and the mandatory subject, the Respondent's seeking offsets to the NBF and the Union's agreement to its business initiatives.

Here, as in *Smurfit-Stone*, I find that the Respondent's proposal that the Union offer offsets to the NBF and the Union's agreement to the Respondent's business initiatives were simply part of the Respondent's proposal which constituted the consideration it requested in exchange for the Union's agreement to exclude the future pharmacists and interns from the unit. This "quid pro quo" was insufficient, as it was in *Smurfit-Stone*, to establish the requisite nexus.

The permissive subject and the mandatory subject were not interdependent, nor were they factually linked. *Borden, Inc.*, 279 NLRB 396, 399 (1986). See *Regal Cinemas, Inc.*, 334 NLRB 304, 305 (2001). The two proposals, permissive and mandatory, are distinct and unrelated. The exclusion of the future pharmacists and interns from the unit concerns the scope of the unit and whether certain categories should be included therein in a new contract.

On the other hand, the Respondent's mandatory subject, its request for offsets to the NBF, is purely economic. The Respondent sought ways in which it could reduce its payments to the NBF. The Respondent asked the Union if it (a) would consider a different benefit plan (b) waive the Respondent's delinquent retroactive contributions to the NBF and (c) would agree that its contributions not be made based on overtime wages.

Thus, the permissive subject and this mandatory subject have no relation to each other. The Union's agreement to offsets to the NBF are independent, rather than interdependent on the exclusion of the future pharmacists and interns from the unit.

Offsets to the NBF could be agreed on regardless of the removal of the future pharmacists and interns from the unit. Stated another way, offsets to the NBF could made without the Union's agreement to the permissive scope of unit proposal. The two proposals are not factually linked. If the Respondent's argument is accepted a permissive subject would become mandatory wherever it was simultaneously presented with a mandatory one. *Borden, Inc.*, 279 NLRB 396, 399 (1986).

The mandatory subjects proposed by the Respondent, that the Union agree to its business initiatives which it also claims was linked to the Union's NBF proposal also lacked interdependence with the permissive subject. Rediclinics and Central Fill related to the ability of the Respondent to provide non-emergency health care to customers and permit prescriptions brought into its stores to be filled at other stores. I cannot find that those two initiatives are intertwined with and inseparable from the permissive subject. They are unrelated to the exclusion from the unit of the two contested categories of employees. If both initiatives were agreed to they would have no bearing and no relation to the exclusion of the future pharmacists and interns from the unit, the permissive subject insisted upon by the Respondent.

Second, as held in *Smurfit-Stone*, above, the Board stated that the linking may not circumvent the general rule that a party may not insist on a permissive subject. Here, as set forth above, the Respondent insisted on a permissive subject of bargaining.

The Respondent's proposal that the Union offer offsets to the NBF and its proposal that the Union accept the exclusion of the positions at issue was simply proposed as a "quid pro quo" for the mandatory term. As such, it was insufficient to establish the necessary nexus. *Smurfit-Stone*, above. The Respondent has not succeeded in showing that there is a proper inseparable nexus and intertwined link between its proposals to modify the scope of the unit with payment of funds to the NBF.

In *Nordstrom, Inc.,* 229 NLRB 601, 602 (1977), relied on by the Respondent, the Board held that permissive and mandatory subjects of bargaining may be linked. However, the Board repeated the *Borg-Warner* mandate "that a party may not lawfully insist upon the inclusion of proposals nonmandatory in nature is, of course, clear." That is exactly what occurred here. The Respondent repeatedly insisted on its nonmandatory proposal that the future pharmacists and interns be excluded from the unit. Accordingly, *Nordstrom* does not support the Respondent's position.[2]

Conclusion

I find and conclude, as alleged, that in violation of Section 8(a)(5) and (1) of the Act, the Respondent insisted, as a condition of reaching an agreement on any collective-bargaining agreement, that the Union agree to remove newly hired interns and pharmacists working in stores in New York State from the bargaining unit, a nonmandatory bargaining proposal.

Conclusions of Law

1. Rite Aid of New York, Inc., and Rite Aid of New Jersey, Inc., a Single Employer, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. 1199 SEIU United HealthCare Workers East, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

> All the professional and non-professional employees of the Employer in drug stores set forth in Article I hereof [the coverage clause of the contract such as certain counties in New York and certain counties in New Jersey but excluding staff pharmacists and supervising pharmacists from the unit], but excluding guards, store managers, co-managers, pharmacy managers, supervising pharmacists, pharmacist-in-charge, New Jersey staff pharmacists and pharmacy interns, and supervisors as defined by the National

[2] The Respondent's reliance on *Dependable Storage, Inc.*, 328 NLRB 44, 49–50 (1999), is misplaced. The Respondent quoted the judge's decision as if it was the Board's decision. (Brief, p. 23). In fact, however, the Board did not address the merits of the case and dismissed the complaint in its entirety because the charge was not timely filed. Accordingly, the judge's discussion of this issue has no precedential value.

Labor Relations Act, as amended, in respect to rate of pay, wages, hours and other conditions of employment.

4. By insisting, as a condition of reaching an agreement on any collective-bargaining agreement, that the Union agree to remove newly hired interns and pharmacists working in stores in New York State from the bargaining unit, a nonmandatory bargaining proposal, the Respondent violated Section 8(a)(5) and (1) of the Act.

5. The unfair labor practices set forth above are unfair labor practices affecting commerce within the meaning Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, it shall be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent insisted, as a condition of reaching an agreement on any collective-bargaining agreement, that the Union agree to remove newly hired interns and pharmacists working in stores in New York State from the bargaining unit, a nonmandatory bargaining proposal, the Respondent shall be ordered to bargain with the Union without conditioning agreement on the Union's agreement to a nonmandatory bargaining subject.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Rite Aid of New York, Inc., and Rite Aid of New Jersey, Inc., a Single Employer, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Insisting, as a condition of reaching an agreement on any collective-bargaining agreement, that 1199 SEIU United Healthcare Workers East agree to remove newly hired interns and pharmacists working in stores in New York State from the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, bargain in good faith with 1199 SEIU United Healthcare Workers East in the following appropriate collective-bargaining unit and reduce to writing and sign any agreement reached as a result of such bargaining:

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.,

> All the professional and non-professional employees of the Employer in drug stores set forth in Article I hereof [the coverage clause of the contract such as certain counties in New York and certain counties in New Jersey but excluding staff pharmacists and supervising pharmacists from the unit], but excluding guards, store managers, co-managers, pharmacy managers, supervising pharmacists, pharmacist-in-charge, New Jersey staff pharmacists and pharmacy interns, and supervisors as defined by the National Labor Relations Act, as amended, in respect to rate of pay, wages, hours and other conditions of employment.

(b) Within 14 days after service by the Region, post at its facilities in all its stores in New York State, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March, 2015.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 30, 2016

Steven Davis
Administrative Law Judge

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

JD(NY)-48-16
New York, NY

APPENDIX
NOTICE TO EMPLOYEES
Posted by Order of the National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO
Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT insist, as a condition of reaching an agreement on any collective-bargaining agreement, that 1199 SEIU United HealthCare Workers East, agree to remove newly hired interns and pharmacists working in stores in New York State from the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL upon request, bargain in good faith with 1199 SEIU United Healthcare Workers East in the following appropriate collective-bargaining unit and reduce to writing and sign any agreement reached as a result of such bargaining:

> All the professional and non-professional employees of the Employer in drug stores set forth in Article I hereof [the coverage clause of the contract such as certain counties in New York and certain counties in New Jersey but excluding staff pharmacists and supervising pharmacists from the unit], but excluding guards, store managers, co-managers, pharmacy managers, supervising pharmacists, pharmacist-in-charge, New Jersey staff pharmacists and pharmacy interns, and supervisors as defined by the National Labor Relations Act, as amended, in respect to rate of pay, wages, hours and other conditions of employment.

RITE AID OF NEW YORK, INC. AND RITE AID OF NEW JERSEY, A SINGLE EMPLOYER

(Employer)

Dated _____ **By** _____

(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to

file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Federal Building, Room 3614
New York, New York 10278-0104
Hours: 8:45 a.m. to 5:15 p.m.
212-264-0300.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02-CA-160384 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0346.